

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
ALEXANDRIA DIVISION

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UNITED STATES OF AMERICA, :  
v. :  
Lieutenant, :  
v. : MISC. NO. 715  
Tanker MACLAM and her tackle, :  
apparel, furniture, equipment,  
etc., in rem. :  
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SUPPLEMENTAL MEMORANDUM  
IN OPPOSITION TO CLAIMANT'S EXCEPTIONS

I.

The Navigation Laws.

The leading case involving 75%/25% citizenship is that of Central Vermont v. Dunning, 274 U.S. 33 (1925). The affidavit annexed as Exhibit A is that covering the MACLAM and is a 75%/25% affidavit. Such an affidavit has been necessary since the Merchant Marine Act of 1920 for vessels which intended to carry cargo between ports and places in the United States in what is called the coastwise trade.

In order to properly appreciate the absence of any authority for the claimant's argument, it is necessary to point out to the court that the decision of the district court, which is mentioned at page 6 of their brief, as having set the question at rest, Stearns Roman v. Woodward, 2 F. Supp. 303, was reversed in the Court of Appeals in 61 F. 2d 1047. It is also necessary to point out that George Kickersham was much too careful a practitioner to have written an opinion which would provide so large a loophole towards foreign interests running American flagships. (Exhibit B) A copy of Mr. Kickersham's letter of July 3, 1911, is annexed. You will appreciate that the Treasury Department has been advised of this position since 1911. The purported opinion of General Counsel Walker is spurious.

Insofar as a statement was made in oral argument that the navigation laws were passed in 1791 and have nothing to do with foreign ownership, the court's attention is directed to the annotations to 46 U.S.C.A. §§11-60. The navigation laws have been brought up to date from time to time. The latest revision was as part of the Customs Administrative Act of 1935.

### II.

#### Relationship between the Navigation Laws and the Ship Sales Act.

The Government would prefer to discuss the legislative history of these acts more completely as part of its trial brief. However, the following summary should suffice to show that the Government's contention is entitled to a full hearing on the merits.

Up until the Shipping Act of 1916, there was no particular advantage for a foreigner to operate under the American flag. In 1916 the Congress passed a construction subsidy program which in a wartime world gave an American national advantages in the purchase of a vessel. The 1916 act had a definition of corporate citizenship:

"Sec. 2. That within the meaning of this Act no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof.

"The provisions of this Act shall apply to receivers and trustees of all persons to whom the Act applies, and to the successors or assignees of such persons." 39 Stat. 729

After the United States entered the First World War, the Shipping Act of 1916, §2, was amended. The amendment included a controlling interest provision and also a majority voting power provision. This is the Act of July 15, 1918, §2, reading as follows:

"Sec. 2. That section two of said act is hereby amended by adding at the end of the first paragraph thereof a paragraph, as follows:

"The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States." 40 Stat. 900.

The purpose of the 1916 amendment was stated by the House Committee and adopted by the Senate as follows:

"Section 2 of the bill amends section 2 of the shipping act by setting forth more in detail under what circumstances a corporation is deemed to be a citizen of the United States within the meaning of the act. Under the present law a corporation, partnership, or association is not a 'citizen' unless 'the controlling interest therein is owned by citizens of the United States.' This phrase has been elaborated to include every possible device by which foreign interests could obtain control in law or fact over corporations formed under American law." H. Rep. 563, Merchant Marine and Fisheries, 65th Congress, 2d sess., on H.R. 12100. (Photostatic copy annexed to original hereof as Exhibit C.)

This amendment was made as permanent law. Congressman Alexander, who represented the Committee, stated:

"Section 2 of the shipping act is amended by adding at the end of the first paragraph a provision the purpose of which is to further safeguard our Government and insure the control of ships being built in American shipyards, to prevent foreign interests, under any sort of device or contract or trust agreement, to get control of our shipping." 56 Cong. Rec. 4026

Congressman Greene, who was also on the Committee, pointed out,

"\* \* \* there was danger that some of the representatives of foreign governments that are engaged against us in war would not hesitate to make some attempt to control our shipbuilding interests, and also, by purchase or other acts, obtain stock in the various vessels that the Shipping Board and private enterprise might construct, such alien enemies might control the management of the vessels or in the event of corporations being formed they might become controlling factors in such corporations." 56 Cong. Rec. 3027

Congressman Hadley explained that the previous 1916 act had caused some difficulty:

"Section 2 of that act provides that--

"No corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof."

"Under the operation of the law it is thought that that language may not be sufficiently restrictive to defeat all possibility of control of American corporations by foreign interests. In order to effect that result the language of section 2 of the bill is employed as an addition or supplement to that portion of section 2 of the existing law just cited.

"The following is the mandatory provision:

"The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding, it is so arranged that the majority of the voting power may be exercised directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States."

"That is proposed as permanent law." 56 Cong.  
Rec. 2026

Congressman London inquired of Congressman Hadley as follows:

"Mr. LONDON. I wanted to ask the gentleman from Washington if the prohibition contained in subdivision (a) of section 2 does not amount in effect to a prohibition of the holding of stock by any alien. The only way of securing that a majority of the stock should be vested in citizens of the United States would be to destroy the negotiability of the individual share of stock."

"Mr. HADLEY. The language to which the gentleman refers--

"Mr. LONDON. That is on page 2, line 20 and following.

"Mr. HALLEY. If the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States, in that event the controlling interest would not be contemplated to be owned by a citizen of the United States unless the condition exists.

"Mr. LONDON. It seems to me the section accomplishes this, that the entire stock will have to be owned and controlled, because the individual purchaser of stock will not be in a position to know whether his share, along with other shares, will not constitute a majority in the nature of foreign holdings. Is not that the effect of it?

"Mr. HALLEY. That is a question of fact that will be determined in the transfers of stock. The point we seek to make is that the controlling interest shall not pass out of the hands of our citizens.

"Mr. LONDON. I am not opposed to it, but it practically destroys the negotiability of the individual stock.

"Mr. HALLEY. I think when the transactions are frank and open there will be no hesitation on the part of those in control of the corporate books to indicate the situation as to existing transfers, so that a purchaser may understand it as it may exist." 56 Cong. Rec. 8028

Congressman Robbins inquired concerning the intended operation of the stock majority provisions. His inquiry was answered by Congressman Saunders:

"Mr. SAUNDERS, of Virginia. I think the difficulties suggested by the gentleman from Pennsylvania [Mr. Robbins] will resolve themselves if he will look to that section of the original act to which this particular section of our bill is an amendment.

"Mr. MORGAN. I have that set before me.

"Mr. SAUNDERS of Virginia. If the gentlemen will look at section 2, he will see--

"That within the meaning of this act no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof."

"In that set certain rights are afforded to citizens of the United States, and this amendment further defines the circumstances under which a corporation, partnership, or association shall not be deemed to be a citizen of the

United States, and if they are not citizens, then they will not be within the benefits of the act. The amendment intends to make it impossible for any arrangement to be effected by which such a corporation, partnership, or association shall be a citizen of the United States, when the real control of same is in the hands of aliens. We have sought to make the language used so sweeping and comprehensive that no lawyer, however ingenious, would be able to work out any device under this section to keep the letter, while breaking the spirit of the law.

"Mr. ROBBINS. Of course, it operates on the majority holders.

"Mr. DAUNIERS of Virginia. Yes. As far as the minority holders are concerned, we do not concern ourselves about them. The majority control must be in the hands of citizens of the United States. We do not care about the minority members.

"Mr. ROBBINS. And it renders the majority holdings non-negotiable.

"Mr. DAUNIERS of Virginia. That may be true." 56 Cong. Rec. 2029

Shortly after the clerk read the section before the vote, Congressman Saunders, Congressman Robbins, and Congressman Stafford had a full discussion showing that they were completely aware of the problem involved and of the way in which Congress intended to correct it:

"Mr. DAUNIERS of Virginia. Mr. Chairman, in addition to what I said a moment ago in this connection I desire to say that the rest of this whole matter may be found in the concluding sentence of this amendment, to wit that 'if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States,' the controlling interest in a corporation shall not be deemed to be owned by citizens of the United States.

"In other words, by the wording of this amendment such a situation is intended to be brought to pass that by no possible legal arrangement can any arrangement be made by which the controlling interest may be in the hands of some other person or persons than citizens of the United States, and at the same time the corporation continue to be a citizen of the United States. I rather think the original act accomplished this result, but there were certain subtle suggested possibilities under the existing law that caused the committee to report the amendment under consideration, as a corrective for these possibilities.

"Mr. DAUNDRIDGE. Mr. Chairman, will the gentleman yield?

"Mr. DAUNDRIDGE of Virginia. Yes.

"Mr. ROBBINS. I would like to call attention to the fact that in the testimony of the attorney for the Shipping Board he called attention to the fact that some law firms in New York City who represented people abroad would buy a ship and all the stockholders would be the members of this law firm, the stock being held in trust, for foreign clients. As I understand it, this is to get around that arrangement.

"Mr. DAUNDRIDGE of Virginia. It seemed to the committee that the plan referred to by the gentlemen from Pennsylvania might circumvent the purpose of the original act. Hence the amendment to afford a remedy for a possible weakness in that act.

"Mr. ROBBINS. What is there in this section you are attempting to amend that would make it impossible or to prevent foreign owners from electing a dummy board of directors who are citizens of the United States and thereby through them control absolutely a shipping corporation, the vessels of which were built and owned by people or interests not of the United States, which ought to be controlled by bona fide citizens of the United States? Would not that give control to foreigners?

"Mr. DAUNDRIDGE of Virginia. Now?

"Mr. ROBBINS. By electing a board of dummy directors who are citizens of the United States while the actual owners would be foreigners. Why ought not this provision to go further? I am heartily in favor of this bill, and what I am suggesting is in good faith to endeavor to strengthen it if it is weak. The bill came in here without much chance on my part to investigate it, but I have before me the shipping act of September 7, 1916, which it is proposed to amend. I think this provision ought to go even further than it does and prevent the acting upon a board of directors of any person who is not a citizen of the United States.

"Mr. DAUNDRIDGE of Virginia. I will ask the gentleman to look to the original language of section 2. As I have stated, this act confers certain rights and privileges upon citizens of the United States. Anyone not a citizen of the United States is denied these rights and privileges.

"Mr. WHITFIELD of Maine. Mr. Chairman, will the gentleman yield?

"Mr. DAUNDRIDGE of Virginia. Yes.

"Mr. WHITFIELD of Maine. I was going to suggest, in answer to the gentleman from Pennsylvania (Mr. Robbins), that you could not have dummy directors except through an arrangement between the dummy and the real parties in interest. Subdivision C of section 2 is so drawn as to prevent an arrangement of that sort, it seems to me.

"Mr. SAUNDERS of Virginia. Yes, that is true.

"Mr. ROBBINS. That, of course, applies only to the majority stock.

"Mr. SAUNDERS of Virginia. The amendment provides that under the circumstances recited the controlling interest in a corporation shall not be deemed to be owned by citizens of the United States.

"If such a scheme as the gentleman from Pennsylvania suggests, was sought to be worked out, it would not only be in fraud of the law, but would be ineffectual, since it would be an arrangement by a contract, or understanding, for the majority of the voting power to be exercised in behalf of some one not a citizen of the United States. Under the terms of the amendment, should such a scheme be perfected, the controlling interest in the corporation would be held not to be owned by citizens of the United States. The scheme would instantly fail of its purpose, if sought to be effected on the line indicated in the suggestion of the gentleman from Pennsylvania.

"Mr. ROBBINS. I want to be sure about it.

"Mr. SAUNDERS of Virginia. The committee invites constructive criticism of the pending bill. It is not wedded to the language reported, and desires to make the bill as strong and as comprehensive as it may be made.

"Mr. STAFFORD. Mr. Chairman, I move to strike out the last two words. Shortly after the beginning of the European war certain ships under the register of a neutral government were transferred under a trust arrangement to American citizens so that these ships could have the protection of the neutral flag of our Government. The original shipping bill was designed to give the benefit of American registry to ships owned bona fide by citizens of the United States and not under color by foreign owners. As has been pointed out by the gentleman from Virginia [Mr. Saunders], section 2, as originally framed, did not reach the case where there was mere colorable title of ownership. The legal title of a majority interest might be owned by American citizens, and yet there might be trust arrangements whereby the real title would be in foreigners, and the profits accruing from the operation of the ships would go to foreigners.

"The Shipping Board has called attention to the evasion of the real purpose of the law so as to allow Americans to have foreign-built ships come within the benefits of American registry and have suggested the amendment that is incorporated here in section 2. This will correct abuses that have been called to the attention of the department and only allow the protection of American registry to those cases where there has been bona fide transfer of ownership to American citizens of the majority interests of the company in the control of these foreign-built ships."

56 Cong. Rec. 6032-6033

Without in any way pre-judging the case, the court's attention is directed to the statement of Mr. Edmonds that some New York law firms would buy a ship and all the stockholders would be members of the law firm, the stock being held in trust for foreign clients. The Government intends to prove that the company was set up by a New York law firm in trust for foreigners.

As part of the Merchant Marine Act of 1920 the stock ownership requirement of the 1918 act was raised from a majority requirement to a 75% requirement. The reason given after the conference by the conference manager, Congressman Jones, for the change is as follows:

"Mr. JONES of Washington. Mr. President, I took no time in discussing the questions involved in this bill on the adoption of the conference report, which has just been agreed to, because I desire to get it over to the other House as soon as possible, and all these matters were discussed when the bill was before the Senate. I am going to take only a moment or two now. Some people, however, on the outside have raised the question as to the meaning of the words 'controlling interest,' which are found in the section relating to the ownership of stock in shipping corporations. The term is used just the same as it is used in the present shipping act, and I do not think there can be any question about the construction that should be given to it. I know that the committee understood it to mean actual bona fide American ownership of a majority of the stock of corporations doing business in the foreign trade and 75 per cent in the coastwise trade. I am satisfied that that is the understanding that the Senate has with reference to that language and that provision. The language of the section will not permit a 'dummy' corporation or a 'dummy' holding of stock. The corporation must be a bona fide one and the ownership and holding of stock must be bona fide American." 59 Cong. Rec. 8470-8471.

The 1920 act also restricted the coastwise trade to 75%/25% corporations, see sections 27, 37, and 38 of the Merchant Marine Act of 1920, 41 Stat. 999-1008. Any person wishing to buy vessels at reduced prices from the old Shipping Board under the 1920 act or wishing to operate vessels in the coastwise trade was required to comply with the provisions of section 2, which read as follows:

"Sec. 2. (a) That within the meaning of this Act no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

"(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

"(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

"(d) The provisions of this Act shall apply to receivers and trustees of all persons to whom the Act applies, and to the successors or assignees of such persons." 41 Stat. 1008

III.

There Is No Constitutional Issue Involved.

The same definition of citizenship as made part of the Merchant Marine Act of 1920 were carried over into the Ship Sales Act under which

the War Shipping Administration vessels were sold with preference being given to citizen corporations. The claimant represented to the Maritime Commission that it was qualified under the Shipping Act and obtained the preferential treatment given American citizens under that act. They are in no position to complain about a preference being given to American citizens when they tried to take advantage of the preference. Moreover, the Supreme Court in Central Vermont v. Durning, 294 U.S. 33 (1935), sustained an even stronger attack upon the Merchant Marine Act of 1920 on behalf of the Canadian National Railway which through two subsidiaries had owned a steamship line on Long Island Sound. This line had actually been owned for sometime before the 1916 act was passed and the result of the 1920 act was not merely to deprive the Central Vermont of a speculative profit to be made by using legal loopholes, but to put an existing steamship company out of business.

The question of constitutional law presented by claimants should be considered by the court only after the evidence is in. The claimant at present has shown no standing to complain of any constitutional violation.

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